ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

REPLY COMMENTS OF AT&T CORP. ON ISSUES RELATING TO THE PROVISION OF IN-REGION INTERLATA SERVICES BY INDEPENDENT LECS

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Pursuant to the Notice of Proposed Rulemaking released July 18, 1996 ("NPRM"), and the Commission's August 9, 1996 Order, AT&T Corp. ("AT&T") submits these reply comments on the regulations that should now apply to the provision of in-region, interLATA services by independent local exchange carriers ("independent LECs").[1]

Introduction and Summary

The comments in this proceeding have vividly confirmed the need to subject independent LECs (and Tier One LECs in particular) to the kinds of structural separation, nondiscrimination, tariff, cost support, and equal access regulations that will apply to Bell Operating Companies ("BOCs") if and when they are authorized to provide in-region interLATA services under Section 271 of the Act. In particular, while there are some respects in which these LECs have less ability to

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[1] A list of the parties filing comments and the abbreviations used to identify them is attached as Appendix A.

use local exchanges to impede interLATA competition than the BOCs would possess today (see AT&T, p. 6 n.11), no party disputes the two facts that establish that independent LECs are certain to use their local exchanges to impede long distance competition in their service areas unless they are subjected to the foregoing regulations until they lose their market power.

First, unlike the BOCs, independent LECs are authorized to provide interLATA services to their monopoly exchange customers today. These LECs do not have to await the implementation of the steps required to open their exchange monopolies to the possibility of competition, much less to satisfy all the requirements of § 271. Indeed, GTE and other independent LECs are now providing interLATA services in their exchange territories while they are simultaneously refusing to negotiate any remotely meaningful interconnection agreements with CLECs and attempting to block the implementation of the local competition provisions of the 1996 Act.

Second, while there was no history of unfair advantage when the Commission adopted its current regulations in 1984, independent LECs have recently begun using their local exchange monopolies to obtain illicit advantages in providing interLATA services to their monopoly exchange customers. For example, SNET has captured an estimated 25 percent of the residential interLATA business originating in exchanges in Connecticut in less than two years time -- with the greatest inroads being made in the past six months -- and analysts are predicting similar "successes" by

GTE and other Tier One LECs.[2] In this regard, the independent LECs' own filings confirms that they are making these extraordinary inroads not by making superior offers to consumers, but by exploiting their status as incumbent exchange monopolists.[3]

Against this background, it is ironic that independent LECs not only have resisted the imposition of stricter regulations on their in-region interLATA operations, but also have argued that the Commission should eliminate the exceedingly mild conditions that now enable them to operate effectively unregulated interLATA businesses through separate divisions as "nondominant carriers." The independent LECs attempt to justify these positions by claiming that the Commission's precedents and antitrust principles foreclose meaningful regulation because no independent LEC could realistically use its local monopolies to capture more than 55% of national long distance usage and that independent LECs no longer have the ability to use their local monopolies to harm interLATA competition. Each of these contentions is meritless.

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[2] See Merrill Lynch, "Telecom Services -- RBOCs and GTE: Second Quarter Review," p. 4 (August 9, 1996).

[3] See GTE, Statement of Paul W. MacAvoy, pp. 32-33 (explaining that GTE's prices are virtually indistinguishable from those of AT&T and other IXCs) ("MacAvoy Statement").

I. THE COMMISSION HAS THE RIGHT AND DUTY TO ADOPT REGULATIONS THAT ARE DESIGNED TO PREVENT INDEPENDENT LECS FROM USING LOCAL MONOPOLIES TO FORECLOSE COMPETITION IN THE PROVISION OF INTERLATA SERVICE TO IN-REGION CUSTOMERS.

The independent LECs' principal claim -- primarily advanced in the affidavits of two economists, Dr. Paul MacAvoy and Dr. Daniel Spulber -- is that the Commission has no authority under its own precedents or antitrust principles to adopt effective regulations of the interLATA services of the independent LECs even when they would otherwise use control over monopoly exchange services to obtain unfair advantages in providing these services to subscribers in their service territories and to capture long distance business from more efficient suppliers. In particular, the independent LECs claim that the Commission is powerless to adopt regulations to prevent the resulting harm to competition and consumers because (1) the long distance market is a national one for other purposes, (2) AT&T was declared nondominant when it allegedly had a 55% share of this national market, and (3) no independent LEC could realistically use local monopolies to capture more than 55% of the national long distance market in that none serves more than a fraction of the nation's exchange customers.[4]

These arguments rest on a misunderstanding of both the Commission's precedents and antitrust laws. Each abundantly support the Commission's tentative conclusion (NPRM, ¶ 126) that it should focus on the areas in which independent LECs' control

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[4] See GTE, pp. 9-11 & MacAvoy Statement, pp. 25-27; USTA, pp. 4-5 & Statement of Daniel F. Spulber; SNET, pp. 3-7, 11 n.17, 17-20; ITTA, p. 5.

bottleneck facilities in determining whether they have market power in their in-region interexchange markets.

First, the LECs' argument is foreclosed by the Commission's precedents. They establish that the Commission has the right and duty to adopt whatever regulations are required to prevent firms that control bottleneck facilities from using them to impede competition in the provision of long distance service to customers within their service areas, irrespective of whether the firms can thereby capture large shares of national or international long distance markets.

That is the basis on which the Fifth Report and Order in the Competitive Carrier proceeding declared that the long distance operations of independent LECs will be regulated as dominant unless the independent LECs comply with conditions that were designed to prevent those harms.[5] That is also the basis on which the Commission presumptively classifies a U.S. carrier that is affiliated with a foreign monopoly carrier as dominant with respect to international calls between the U.S. and that foreign country.[6] Indeed, since the inception of the Competitive Carrier proceedings, the Commission has always made clear that control of bottleneck facilities is the most important factor in determining

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[5] Fifth Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, 98 F.C.C.2d 1191, 1204 (¶ 18) (1984) ("the requirement of a separate affiliate for nondominant treatment is warranted by our concerns about cost-shifting, discriminatory exchange access, and the dominance of exchange telephone companies in exchange services").

[6] See 47 C.F.R. § 63.10.

whether a carrier should be subject to stringent regulation.[7] In this regard, AT&T was declared nondominant because it was undisputed that it possessed no bottleneck monopoly that could be used to harm competition in any section of the country.[8]

Similarly, the claims of Professor MacAvoy and the independent LECs are equally foreclosed by basic antitrust principles, again notwithstanding the fact that the market for long distance services is otherwise a national one. In particular, it is well settled that evidence of market definition and market share is irrelevant in any context in which power adversely to affect price or output is proven directly.[9] A remedy to protect competition would be clearly appropriate under antitrust principles if the Commission were to conclude -- as the undisputed facts show -- that independent LECs would otherwise use bottleneck monopoly power in their service areas to raise

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[7] First Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, 85 F.C.C.2d 1, 23 (1980) ("An important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities. . . . We treat control of bottleneck facilities as prima facie evidence of market power requiring detailed regulatory scrutiny" (footnote omitted)).

[8] Order, Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427, 11 FCC Rcd. 3271, 3282, 3291 (¶¶ 14, 32) (1995).

[9] See, e.g., Allen-Myland, Inc. v. IBM Corp., 33 F.3d 194, 209 (3d Cir. 1994) (quoting Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986)); Atlantic Tele-Network, Inc. v. FCC, 59 F.3d 1384, 1389 (D.C. Cir. 1995); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983); United States v. Western Elec. Co., 900 F.2d 283, 301 (D.C. Cir. 1990); Southern Pac. Communications Co. v. AT&T, 740 F.2d 980, 1001 (D.C. Cir. 1984).

interLATA rivals' costs and to shift interLATA business away from more efficient suppliers, whether or not the individual LEC could ever realistically obtain a monopoly share of a national market.[10] Indeed, that is the basis on which the provisions of the MFJ (which are largely now codified in § 271 of the Communications Act) were imposed as an antitrust remedy and upheld by the Court of Appeals.[11]

The foregoing points were developed at great length in AT&T's Comments in Docket No. 96-61, the Commission's recent interexchange market rulemaking.[12] Yet neither the independent LECs nor their experts have even acknowledged AT&T's earlier showings, much less attempted to refute them. That is vivid confirmation of their correctness.

The claims of Professors MacAvoy and Spulber are particularly ironic given the circumstances of GTE's and SNET's

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[10] See Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 373-75 (7th Cir. 1986) (carrier's monopoly power over Commission-regulated telex services could give it "power to curtail competition in the complementary equipment market" notwithstanding that it held "only a tiny fraction" of the equipment market).

[11] United States v. Western Elec. Co., 900 F.2d 283, 301 (D.C. Cir. (1990); United States v. Western Elec. Co., 969 F.2d 1231, 1241-43 (D.C. Cir. 1992).

[12] AT&T Comments on Market Definition, Separations, Rate Averaging, and Rate Integration, pp. 2-28, Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, Docket No. 96-61 (filed April 19, 1996); Reply Comments of AT&T Corp. on Market Definition, Separations, Rate Averaging, and Rate Integration, Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, Docket No. 96-61, pp. 2-9 (filed May 3, 1996).

recent entry into the long distance market. GTE, for example, according to recent reports "already has more than 300,000 [long distance] customers, growing at 6000 per business day, or an annualized market share gain of about 7% . . . all in only six months of initial operation."[13] Similarly, SNET in two years of operations "already has 25% of the customers" in its service area; "[i]ts long distance base has grown from 165,000 a year ago to 525,000 on June 30, 1996, a 218% increase."[14]

Further, as Professor MacAvoy is at pains to explain, GTE has achieved these extraordinary inroads by offering prices that are only trivially lower than AT&T's, and that even these minuscule discounts are only being offered initially as a means to offset the other IXCs' "first-mover advantages," and not as the result of a superior offering.[15] Indeed, it is apparent that even the trivial initial discounts were made possible by the fact that these independent LECs are continuing to impose inflated access charges on competing IXCs that are radically in excess of their economic cost, but are illicitly ignoring these access charges in setting their own interLATA service rates. Indeed, one LEC has recently openly publicized an interLATA rate

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[13] Merrill Lynch, "Telecom Services -- RBOCs and GTE: Second Quarter Review," p. 4 (August 9, 1996).

[14] Id.

[15] MacAvoy Statement, pp. 32-33 ("In the current context, GTE Long Distance must make substantial marketing investments and offer price discounts in order to overcome the substantial brand names of AT&T, MCI, and Sprint. GTE Long Distance currently offers discounts to residential customers . . . but these do not differ from those of AT&T").

structure that gives itself improper advantages in calls that use its own monopoly access facilities in precisely these ways.[16] In all events, GTE's and SNET's astonishing and unprecedented rates of market share growth can only be attributed to, and are in fact a result of, the exploitation of their status as incumbent exchange monopolists.

II. LECS' MONOPOLY CONTROL OVER ESSENTIAL FACILITIES IN THEIR LOCAL MARKETS ENABLES THEM TO EXERCISE MARKET POWER IN THE INTEREXCHANGE MARKET.

The independent LECs have alternatively made a series of claims to the effect that they have lost their local exchange bottlenecks or otherwise no longer have the ability to use market power over local or exchange access service to obtain illicit advantages in long distance markets. These claims do not withstand cursory analysis -- as other commenters have demonstrated.[17]

First, several LECs claim that Section 251, and the Commission's implementing regulations, have by themselves broken the LECs' bottlenecks and destroyed these LECs' ability to

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[16] In particular, in offering interLATA services that originate outside the NYNEX region -- as it is permitted to do under § 271 of the Act -- NYNEX is actually advertising that it charges a lower rate for calls that terminate in its region (13 cents per minute) than for call that terminate outside its region (16 cents per minute). See Appendix B to this reply. Because there is no difference in access charges that could support these differential rates, NYNEX is plainly using its control over essential facilities and above-cost charges for terminating access to impose price squeezes.

[17] See MCI, pp. 2-3; Teleport, p. 2 (agreeing with points made at AT&T, pp. 5-7).

discriminate against interexchange competitors.[18] These claims are extraordinary. To be sure, Section 251 and the Commission's rules can, when implemented in actual interconnection arrangements, create the conditions that should allow local competition to develop. However, the rules not only have not yet been implemented, but GTE and other independent LECs both are refusing voluntarily to comply with the Commission's rules and are seeking to stay them. Beyond that, these independent LECs will have no incentive in fact to implement the necessary interconnection and access arrangements even if and when appropriate agreements are imposed on them following arbitration and court proceedings.

Further, even full implementation of § 251(c) will simply give IXCs and other CLECs the opportunity to use incumbent LEC facilities to compete with incumbent LECs in providing local service. Those arrangements will not themselves create alternatives to the independent LECs' existing access monopolies, and they are not designed to prevent (or capable or preventing) independent LECs' from discriminating with respect to the separate interface between LEC and IXC networks. Such discrimination would give the incumbent LECs' illicit advantages in serving customers who desire integrated packages of local and long distance service or in impeding the ability of IXCs to retain the long distance business of customers who continue to use the incumbent LEC for local service.

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[18] See, e.g., GTE, pp. 18-20; USTA, pp. 5-6; SNET, pp. 13-15; Citizens, p. 5.

These points were developed in greater detail in AT&T's separate comments in this Docket on the rules that should be implemented under § 272 of the Act and applied to the BOCs if and when they obtain interLATA authority in particular states.[19] They apply, a fortiori, in the case of independent LECs who can provide, and are providing in-region interLATA services, before any steps are taken to implement § 251. Strict regulations of interLATA operations of independent LECs is plainly necessary to prevent harms to competition until such time as the independent LECs in fact lose market power over IXC service.

Second, several independent LECs also argue that they currently face competition from competitive access providers ("CAPs") and others in providing access services to IXCs and that AT&T and other IXCs have present alternatives for access services.[20] These claims are fanciful. As AT&T has shown elsewhere,[21] CAPs provide a tiny percentage of all access services nationwide, and the overwhelming majority of CAP facilities are themselves located in territories of BOCs, not those of independent LECs. This monopoly control of exchange access has allowed the independent LECs (as well as the BOCs) to

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[19] See AT&T's August 30 Reply Comments, pp. 10-11.

[20] See GTE, p. 20 (arguing that it could not risk the "departure" of an IXC access customer); USTA, p. 8 (no incentive to "risk" revenues gained from access); ITTA, p. 12.

[21] See, e.g., AT&T's Further Opposition to the Motion to Vacate the Decree, pp. 17-19, United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C., filed August 23, 1995).

raise access charges far above economic cost, as other commenters recognize.[22]

Third, SNET makes an argument that focuses on one possible means of obtaining illicit advantages -- an independent LEC's ability unilaterally to increase its access charges to squeeze IXC competitors -- and argues that the Act's requirements of geographic rate averaging would mitigate the effects of any unilateral increase by requiring that the increases be partially exported to other areas.[23] However, SNET simply ignores the fact that it and all of the other LECs (including the RBOCs) have already imposed access charges that are far above cost, thus forcing the IXCs to provide long distance service at rates above their true economic cost. The LECs' above-cost access charges thus permit them to undertake a classic anticompetitive price squeeze in the interexchange market (see NPRM, ¶ 141) -- and LECs have engaged in this misconduct in the most open and notorious ways, as documented above. See p. 9 n.16, supra. And as the Commission recognizes (¶ 139), the LECs' physical control over access facilities also gives them the ability to raise their interexchange competitors' costs through discrimination, apart from the pricing of access.

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[22] See, e.g., MCI, p. 5.

[23] SNET, pp. 19-20 & Att. B; see also USTA, p. 6. Even if the geographic averaging rules did result in only a small increase in rates borne by all users nationwide, as in SNET's example, the result would still be increased prices, restriction of output and harm to the competitive process that should not be tolerated by the Commission.

III. THE COMMISSION SHOULD ADOPT APPROPRIATE REGULATIONS TO CHECK THE POTENTIAL ABUSE OF MARKET POWER BY INDEPENDENT LECS.

Against this background, there is not the slightest doubt that independent LECs can and likely will use local market power to impede competition in providing interLATA services that are subscribed to in their service territories -- and that the Commission's existing regulations cannot prevent these abuses.[24] Accordingly, it is critically important that the Commission now at least subject independent LECs to the kind of safeguards that would apply to in-region interLATA services of BOCs if and when they can satisfy the strict requirements of § 271 -- especially mandatory structural separation, a prohibition on the integration of exchange and interexchange facilities, strict nondscrimination requirements, and price floors. While independent LECs have argued that these specific regulations cannot be adopted, these claims have no substance.

First, GTE argues that Section 601 of the 1996 Act prohibits the Commission from imposing structural safeguards on GTE.[25] This contention is frivolous. By its terms, Section 601(a)(2) states merely that "[a]ny conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree" is

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[24] As AT&T has shown elsewhere in this Docket, the Commission's current non-structural safeguards and price cap rules were not designed for, nor would they be effective in, combatting the possibility of cost misallocation and discrimination in the context of LEC provision of interexchange service. See AT&T's August 30 Reply Comments, pp. 11-14 (and sources cited).

[25] See GTE, pp. 5, 25-27.

now "subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act." The other, preexisting provisions of the Communications Act unquestionably grant the Commission broad authority to promulgate structural separation requirements when necessary to prevent anticompetitive "conduct or activity" in the interexchange market. That is why the Commission has long had regulations that are designed to do precisely that. These regulations must now be strengthened in light of the recent intervening experience.

Second, several LECs protest that the costs of separation would outweigh the benefits to competition.[26] The asserted costs of separation that these LECs cite, however, are the foregone "operational efficiencies" and "economies of integration" that inherently produce the discrimination in favor of the LECs' interLATA operations and cross-subsidization of its operations that confers anticompetitive advantages on the independent LEC.[27] As AT&T has shown in its comments on the rules that would apply to BOCs even after they satisfy the stringent entry test of § 271, structural separation is necessary to prevent the myriad forms of discrimination and cost misallocation that otherwise would likely occur without detection and thereby harm competition.[28] In this regard, Professor

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[26] GTE, pp. 36-40; SNET, pp. 29-34.

[27] See GTE, p. 37; USTA, p. 12 ("joint ownership of switching and transmission facilities"); Citizens, p. 6.

[28] AT&T's August 15 Comments; AT&T's August 30 Reply Comments, pp. 14-20.

MacAvoy and the independent LECs ignore that it is the ability to portray this anticompetitive conduct as "efficiencies" of integration that makes it so insidious and difficult to prevent through after-the-fact review and remedies.

Finally, independent LECs argue that they should be exempted from the rules applicable to BOCs because they are small and have operations of limited scope, and several LECs urge exemptions based on different measures of size.[29] As AT&T argued before, the Commission could reasonably exempt all but Tier One LECs from the structural separation requirements.[30] The larger independent LECs, such as GTE and SNET, have quite large operations and the potential to cause substantial competitive harms, and therefore the full panoply of protections should apply to their provision of interLATA service.

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[29] See, e.g., SNET, pp. 31-34 (exempt all carriers with fewer than 2 percent of the nation's access lines; rules would apply only to GTE and Sprint); NTCA, p. 4 (exempt all "rural telephone companies"); see also GTE, pp. 28-36 & 27 (existence of Section 601 supports exemption for GTE but perhaps not others).

[30] See AT&T, p. 11.

CONCLUSION

For the reasons stated, the Commission should require the in-region interLATA services of all independent LECs -- and at a minimum of Tier One independent LECs -- to be offered under the same terms and conditions that will apply to BOCs if and when they obtain in-region authority under § 271 of the Act.

Respectfully submitted,

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September 13, 1996

APPENDIX A

APPENDIX A

LIST OF COMMENTERS

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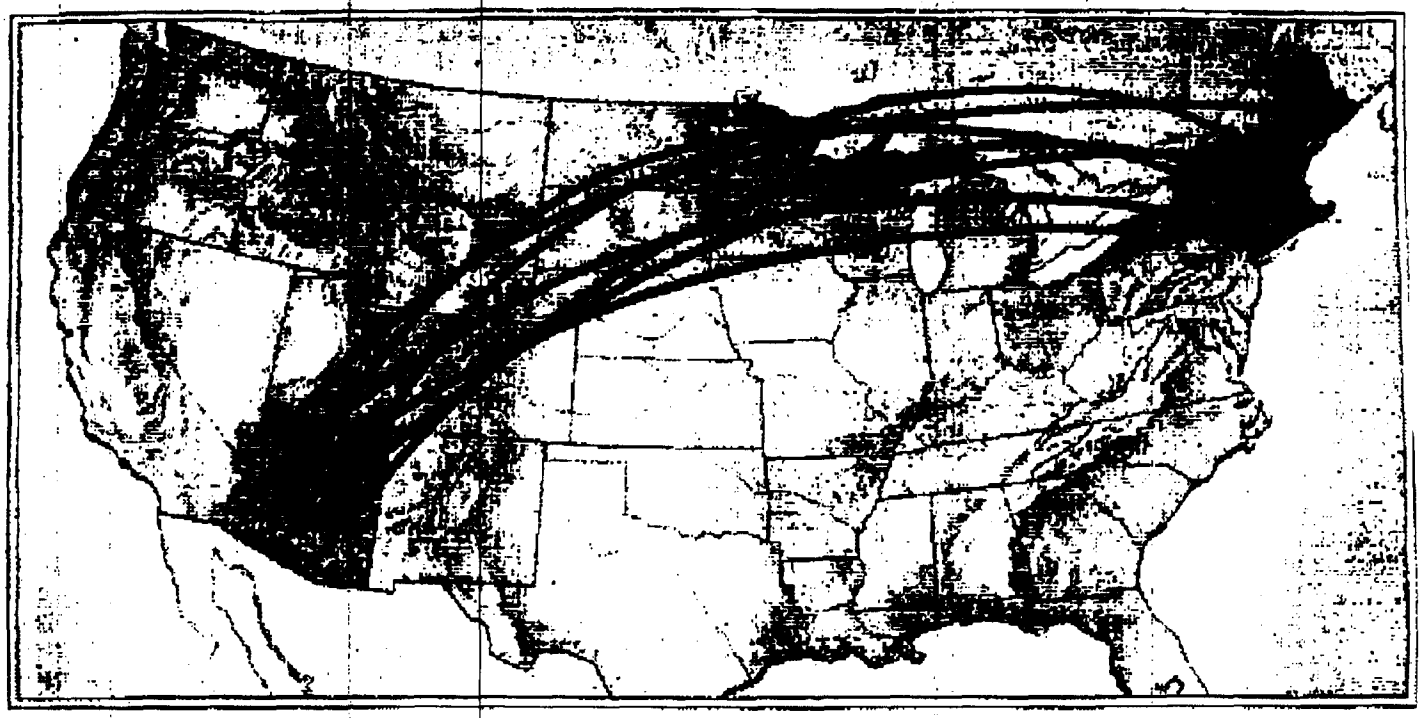
GTE Service Corporation ("GTE")
Independent Telephone & Telecommunications Alliance ("ITTA")
MCI Telecommunications Corporation ("MCI")
National Telephone Cooperative Association ("NTCA")
Southern New England Telephone Company ("SNET")
Sprint Corporation ("Sprint")
Teleport Communications Group, Inc. ("Teleport")
United States Telephone Association ("USTA")

APPENDIX B



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I hereby certify that on this 13th day of September, 1996, I served copies of the Reply Comments of AT&T Corp. on Issues Relating to the Provision of In-Region InterLATA Services by Independent LECS by U.S. first class mail, postage prepaid, on each of the parties on the attached service list.

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